UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants,

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

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PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION *IN LIMINE* - KEVIN KENNEDY

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011 JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Kevin Kennedy, the Government Accountability Board's director and counsel, is the state's principal administrative officer for all of its elections. He has held that position for 27 years. He is non-partisan. He speaks for the board he counsels and the 20-person staff he manages. He is a named defendant in his official capacity but, in part because of his unquestioned reputation for integrity and independence, he is one of the plaintiffs' indispensable witnesses. To accommodate his schedule, the plaintiffs and defendants' counsel have agreed that he will testify as the first witness Wednesday afternoon, the second day of trial.

On February 15, 2012, almost a week beyond the deadline established by the Court, the defendants' counsel filed a motion *in limine* to prevent Mr. Kennedy from testifying "about census anomalies or other evidence related to the implementation of Acts 43 or 44." Defendants' Motion *in Limine* at 5. It was the only motion *in limine* filed by any party—before or after the February 9, 2012 deadline.

The Court should deny the motion for three reasons.

First, given his experience and official position, Mr. Kennedy is the best—if not the only—witness to address the "implementation" of the statutes at issue. Second, his agency late last year itself identified the irregularities in Acts 43 and 44 and chose the word "anomalies" to characterize those irregularities, and Mr. Kennedy himself can briefly explain their relevance. Should the legislature or, failing success there, the Court find it necessary to reconfigure district lines, the importance of the problem will be readily apparent. Third, the evidence the defendants seek to exclude principally consists of admissions in documents that GAB itself authored, which prove allegations already contained in plaintiffs' complaint.

The anomalies are facts. They require no expert testimony or amendment to the pleadings for their relevance to be established. Finally, the motion seems to rest primarily on one defense counsel's recollection of communications plaintiffs' counsel had with another defense counsel. The trial exhibits and deposition testimony are far more persuasive with respect to Mr. Kennedy and the "anomalies."

I. THE IMPLEMENTATION OF REDISTRICTING IS CENTRAL TO THIS LITIGATION, INCLUDING THE VOTING RIGHTS ACT CLAIMS.

The state legislature, for better or worse, is not a party to this litigation. It is the Government Accountability Board (GAB) that is empowered to implement the statute, translating the skeletal language of the statutes into the geographical entities (wards and districts) in which the people exercise the one person-one vote principle at the heart of the districting process. Indeed, from its first pleadings in this case, the GAB has emphasized that its primary role in redistricting is precisely that. The GAB, it states forthrightly, "did not prepare, edit or in any other way draft the redistricting maps...." Defs.' Initial Rule 26(a) Disclosures (Dkt. 53) Ex. B at 2. Rather, "GAB and the individual defendants have been sued because of their

statutory responsibility to *implement* the districts that are now the law of the State." *Id*. at 3 (emphasis added); *accord* Pls.' Tr. Ex. 10 (Defs.' Am. Rule 26(a) Disclosures) at 1.

The origins of the "anomalies" controversy are both briefly stated and illuminating. On January 13, 2012, GAB and Kevin Kennedy publicly issued a seven-page memorandum declaring that "strict compliance" with Acts 43 and 44 "is impossible" because those statutes attributed "census blocks . . . to incorrect municipalities or voting districts." Pls.' Tr. Ex. 80 at 6-7. Put "simply," as the defendants themselves have said, the statutes were "based on Census data," but they "define the districts using inaccurate municipal boundaries." *Id*.

The plaintiffs learned of the problem through newspaper headlines and articles that, while not cited for their truth, are cited here for the attention they understandably elicited: "Redistricting problems mean thousands are listed in wrong district." Declaration of Douglas M. Poland (Dkt. 113), ¶ 2. An even earlier GAB memorandum, dated November 10, 2011, concluded that Act 43 "must be violated in practice in order to give a voter the correct ballot." Pls.' Tr. Ex. 79 at 4.

Since mid-January, the parties have struggled to learn the legal and practical significance of the anomalies. GAB stated that "census blocks do not reflect the correct municipal boundaries and the results of implementing these incorrect boundaries … would place voters on the wrong poll books for each election." *See* Pls.' Tr. Ex. 79 (Dkt. 113) (Internal Government Accountability Board Memorandum from Sarah Whitt, SVRS Functional Lead, and Shane Falk, Staff Counsel to Nathaniel E. Robinson, Elections Division Administration, and Ross Hein, Elections Supervisor, regarding Census Blocks Conflicting with Municipal Boundaries (Nov. 10, 2011)).

Tony Van Der Wielen, Geographic Information Services Manager for the Legislative Technology Services Bureau, testified in response to a question whether he has had any discussions with anyone about whether the final districts will not strictly match those prescribed by Acts 43 and 44 that "I think that's pretty much a given. I mean, if you think about what GAB is doing, they're gathering datasets that don't follow the census blocks, so in essence, the lines will not strictly match. I don't know how far off they would be." Deposition of Tony Van Der Wielen (Dkt. 173) at 89:7-90:1.

II. THE GAB ITSELF IDENTIFIED THE ANOMALIES, STRUGGLES STILL TO RECONCILE THEM, AND THE COURT AT THE LEAST NEEDS A RUDIMENTARY AWARENESS OF THEM.

Through one of the serial discovery disputes that have come to characterize the pre-trial docket here, the defendants belatedly acknowledged what the news media had disclosed. Faced with the potential for an order to show cause hearing, and their complete failure to produce any documents referring to these problems, the defendants belatedly produced documents and, ultimately, the deposition testimony of three witnesses (including Mr. Kennedy) involving the anomalies. In short, it has become clear, the legislative district lines do not invariably coincide with the census block lines that the legislature used, notwithstanding the state constitutional mandate in Article IV, Section 3, to configure the state's legislative districts using local government boundaries. *See*, *e.g.*, Pls.' Tr. Ex. 80 at pp. 6-7.

The practical effect of this dysfunction has been difficult, for all of the parties, to understand and to determine its legal effect, if any. The plaintiffs did decide not to move to amend their complaint based on the self-described "anomalies," *see* Def. Br. (Dkt. 160) at 3, but that hardly makes them irrelevant—though the defendants might wish they were.

The defendants, both in their original motion for protective order (Dkt. 107) and in the brief supporting the motion *in limine*, persistently refer to "errors in the census." Yet errors—

more precisely, imprecision—in the federal census are not at issue and never have been. The census is not exact; no one thinks it is. The "anomalies" here arose not from the census but from the legislature's deliberate decision to enact a statute *before* the state's local governments had drawn the ward and municipal boundaries upon which, until this year, the redistricted boundaries (whether by law or judicial order) had been based.

The effect of—the "implementation" of that decision—has led to confusion and uncertainty. It is not necessary for the plaintiffs to assert that the problems rise to the level of constitutional flaw to qualify them for admissibility under the Federal Rules of Evidence. Had they moved to amend the complaint, they would have ignored a precept repeated in the defendants' *in limine* brief and in the Court's own admonition at the final conference: the limited amount of trial time available. This is neither the time nor the case to penalize restraint in pleading.

But, more to the point, plaintiffs required no amendment to their Second Amended Complaint or expert testimony to demonstrate the relevance of the "anomalies" to their claims. Plaintiffs pled, as part of their allegations in their Second Amended Complaint, that the "new districts are not bound by county, precinct, town or ward lines already established by local governments." *See* Pls.' Tr. Ex. 11 (Second Am. Compl.) ¶¶ 39-40. In other words, plaintiffs already made relevant to this action through the claims of their complaint the failure of the district boundaries in Act 43 to follow county, town, precinct, or ward boundaries. The very evidence GAB's counsel now seeks to exclude proves plaintiffs' claim: it establishes that the boundaries in Act 43 do not match local boundaries, including ward boundaries, and that correcting those "anomalies" or "boundary exceptions" is an ongoing—but incomplete—process.

The defendants continue their effort, in the motion, to narrow to nothingness the scope of the case: "But the process by which Acts 43 and 44 came into being is no part of this case, nor is any confusion or uncertainty with respect to implementing...[them]." Defs.' Br. (Dkt. 160) at 4. Yet the process is very relevant, as this Court and its colleagues in the Northern District of Illinois have held, *see Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, No. 11-CV-5065, 2011 WL 6318960, at *16 (N.D. Ill. Dec. 15, 2011). Moreover, the "implementation" of the statutes is the defendants' own self-defined role in this case, justifying by all accounts their very presence as defendants.

The defendants are correct in one respect: this Court will not, for now, hear testimony about "remedies"—maps that might have been drawn or, if the Court finds the laws unconstitutional, maps that the Court should consider. Mr. Kennedy will not testify about those remedies. But his testimony about anomalies is directly relevant to the process by which the legislature adopted the statutes and the process by which the defendants are trying, in their own words, to implement them.

This much is certain: Kevin Kennedy will testify because, for a variety of reasons, he is an indispensable witness. Those questions and answers are important to the Court's understanding of the "implementation" process. Should the Court by itself under *Perry v. Perez*, 565 U.S. ___, 132 S. Ct. 934 (2012), or the legislature—if given another opportunity—need to adjust district boundaries, the Court needs to be aware of the reconciliation problem. In that regard, Kevin Kennedy has the light switch for what otherwise would be a darkened room.

CONCLUSION

For the reasons stated above, the Court should deny the defendants' motion *in limine* to restrict the questions asked of Kevin Kennedy, the principal defendant in this case.

Dated: February 22, 2012.

GODFREY & KAHN, S.C.

By: */s/ Douglas M. Poland*

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